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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,
Petitioner,

v.

ALBERT ROSS, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA, AMICI CURIAE, IN SUPPORT OF RESPONDENT

QUESTIONS PRESENTED

1. Whether the Court should expand the narrow exception to the Warrant Clause for automobile searches to permit warrantless searches of every container

found in the trunk of an automobile that has been seized upon probable cause.

2. Whether the Court should create a new exception to the Fourth Amendment to strip "unworthy" containers of Warrant Clause protection.

INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a non-partisan, non-profit membership organization which for more than sixty years has been dedicated to the protection of personal liberty through a vigorous defense of the fundamental principles embodied in the Bill of Rights. The American Civil Liberties Union Fund of the National Capital Area (Fund) is the Washington, D.C. area litigation arm of the ACLU. ACLU and Fund have frequently appeared in this Court and in other courts, as counsel for the parties and as amici, in

Fourth Amendment cases. E.g., Terry v. Ohio, 392 U.S. 1 (1968); Michigan v. Summers, 101 S. Ct. 2587 (1981).

This case presents two major Fourth Amendment questions of critical import to those concerned with civil liberties. First, the United States has argued that several decisions of this Court should be overruled, so that, if probable cause exists to seize a motor vehicle, a general warrantless search of the vehicle and every container found therein would become permissible. The government also has argued that the Court should declare that individuals have no reasonable expectation of privacy in a broad range of bags, parcels and containers commonly used in everyday life to transport or store possessions. If that rule were adopted, those containers would become subject to warrantless searches wherever found --

whether in the home, the car, or on a person's arm on a public street. We have submitted this Brief because of our view that the impact of the government's proposed reductions in Fourth Amendment protections would significantly and adversely affect the liberties of all law-abiding persons.[1/]

STATEMENT

This case involves the constitutionality of a warrantless search of a closed paper bag, found in the locked trunk of a motor vehicle after the vehicle had been stopped and seized, and its driver arrested, on the basis of probable cause to believe the trunk of the car contained contraband. In its order granting certiorari, the Court asked the parties to

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1/ Letters of consent from the parties to the filing of this brief have been lodged with the Clerk of the Court.

address the question whether it should reconsider its decision in Robbins v. California, 453 U.S. ___, 101 S. Ct. 2841 (1981) (hereinafter "Robbins"). There, the plurality opinion held that a warrant was required to search any container outside the passenger compartment of a motor vehicle during a warrantless search based upon probable cause, unless the characteristics of the container caused its contents to be obvious to an observer. We respectfully submit that Robbins was correctly decided and that, to the extent it is reconsidered in this case, its holding should not be disturbed.

We will not repeat the parties' description of the facts and the procedural posture of the case. We wish to note, however, that two issues litigated below are not before the Court on the government's petition for certiorari:

(1) The government has not raised in this Court the question whether Arkansas v. Sanders, 442 U.S. 753 (1979) (hereinafter "Sanders"), applies retroactively.[2/] (2) The government conceded below that the warrantless search of a zippered red leather pouch found alongside the paper bag in the trunk of respondent's automobile was unlawful under Sanders, and the lawfulness of that search is not at issue here.[3/]

SUMMARY OF ARGUMENT

The Court's request that the parties address the question whether Robbins should be reconsidered has led the government to

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2/ Petition of the United States for Certiorari at 5 n.1 & 8 n.7; Brief of the United States (hereinafter "Gov't Brief") at 5 n.2.

3/ Gov't Brief at 5 n.2. See United States v. Ross, 655 F.2d 1159, 1161 & n.3 (D.C. Cir. 1981) (en banc). In consequence, respondent's conviction will be reversed whatever the outcome of this proceeding.

advocate two overbroad and constitutionally unjustified positions.

Its most extreme suggestion is to urge a dramatic expansion of the so-called "automobile exception" to the Warrant Clause of the Fourth Amendment. The government argues that the Warrant Clause should not apply at all to an automobile or its contents if a law enforcement officer has probable cause to believe it contains evidence of a crime.[4/] It urges this Court to establish a per se rule that any container found in an automobile in such circumstances may therefore be searched without a warrant -- no matter what the nature of its construction or its likely contents, and even though the vehicle and its occupants have been secured.

4/ Gov't Brief at 41-47.

We believe the government's "automobile trunk exception" argument is wholly inconsistent with a series of recent Fourth Amendment decisions -- most particularly United States v. Chadwick, 433 U.S. 1 (1977) (hereinafter "Chadwick"), Sanders, and Robbins. Those decisions are sound law and should be reaffirmed. The government has advanced no rationale to support its view that reasonable expectations of privacy are abandoned when containers are placed in locked motor vehicle trunks. It has also failed to articulate any compelling need to justify creating a new exception to the Warrant Clause. It simply reiterates the constitutionally insufficient notion that law enforcement would be streamlined if there were no warrant requirement.

Alternatively, the government urges adoption of a new Warrant Clause exception

for certain types of containers which, in its view, are unworthy of protection against warrantless intrusion. The government recognizes that this rule would be more difficult for the police and the courts to comprehend or administer than the rule set forth in Robbins. Yet it argues that the Court should embark on a course of providing or withholding constitutional protection to a wide variety of receptacles commonly used to transport possessions, depending upon such ambiguous considerations as whether or not they are "conventionally regarded as embodying a substantial privacy interest"; are the "functional equivalent of luggage"; contain "personal" or "impersonal" matter; or display indicia of a subjective desire on the part of their owner to conceal their contents. Gov't Brief at 14, 27-28, 31.

The government's "unworthy" container argument is unmeritorious as a matter of constitutional law. A broad variety of "non-traditional" containers, including paper bags, plastic bags, and tote bags, are commonly used and transported by the public with full and reasonable expectations that they will remain free from warrantless governmental intrusion. The notion that the Fourth Amendment protects only certain conventionally approved, rigid containers or those located in certain places is simply wrong. Such a rule will necessarily lead, as the government concedes,[5/] to a new wave of Warrant Clause litigation. Furthermore, law enforcement officers considering whether they must obtain a warrant before searching a container will be unable to derive any meaningful guidance from the

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5/ See Gov't Brief at 40-41.

mystifying tests the government regards as relevant.

We believe that Robbins and the Court of Appeals' decision below were correct. The Court should state plainly that warrantless intrusions into containers in locked automobile trunks are unlawful. If this is made explicit, the police routinely will take the ministerial and nonburdensome steps necessary to obtain warrants, and no law enforcement interest will suffer as a consequence. Rather, this salutary development will allow law enforcement authorities to avoid the loss of cases that should have been won and reduce the interminable litigation in this area.

ARGUMENT

I. CONTAINERS FOUND IN THE LOCKED LUGGAGE COMPARTMENT OF AN AUTOMOBILE MAY NOT BE SEARCHED WITHOUT A WARRANT.

The government has seized upon the Court's invitation to address whether the

decision in Robbins should be reconsidered to argue the broad proposition that any container found in the trunk of an automobile, stopped and seized upon probable cause, should be subject to warrantless search. The Court previously has considered and squarely rejected similar arguments in Sanders and in Robbins. The Court should once again and flatly decline the government's invitation to create such an unjustifiable extension of the narrow automobile exception to the Warrant Clause.

The government's Brief restates the arguments in Sanders and Robbins and advances no new reasons why the proposed exception should be created. The fatal flaw in the government's position is its refusal to come to terms with the decision in Chadwick that reasonable and legitimate expectations of privacy attach to

containers, even when located outside the home or office. In the final analysis, the government's argument reduces to two practical considerations, neither of which supports the rule for which the government contends: (1) the familiar assertion that police officers are unnecessarily inconvenienced by the necessity of obtaining a search warrant for containers found in automobiles; and (2) the promise that its proposed "bright-line" test would resolve the doctrinal uncertainty in this area and thereby reduce the burden automobile search cases impose on judicial resources. As we show below, the Court should reject the government's invitation to overturn the considered development of the law in this area.

A. Important Expectations of Privacy Prohibit Warrantless Searches of Containers Located Temporarily in the Luggage Compartment of an Automobile.

1. Containers Are Protected by the Fourth Amendment and Do Not Forfeit That Protection Because They Are Located Temporarily in a Locked Automobile Trunk.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[6] This Court long has held that, to be "reasonable," a search ordinarily must be conducted on the basis of prior authorization granted by a neutral magistrate in the form of a valid search warrant.[7] The Court has so held primarily

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6/ U.S. Const., Amend. IV(1)(c) (emphasis added).

7/ E.g., Arkansas v. Sanders, supra, 442 U.S. at 758-59; Mincey v. Arizona, 437 U.S. 385, 390 (1978); United States v. Chadwick, supra, 433 U.S. at 9.

because of its recognition that law enforcement officers preoccupied with discovering crime may tend to initiate searches where no probable cause exists, or may conduct searches in a wide-ranging and general fashion.[8/] To guard against governmental invasion of the liberties of the law-abiding, the Court has held repeatedly that the warrant requirement is subject only to a few "jealously and carefully drawn" exceptions.[9/] And the government bears the heavy burden of proving the need for such extraordinary exceptions to the Warrant Clause.[10/]

8/ Id. See Arkansas v. Sanders, supra, 442 U.S. at 759 & n.5. The Court has also identified the need to inform the subjects of a search of the legitimacy of police authority as another reason for the warrant requirement. See, e.g., Camara v. Municipal Court, 387 U.S. 523, 532 (1967); United States v. Chadwick, supra, 433 U.S. at 9.

9/ See, e.g., Arkansas v. Sanders, supra, 442 U.S. at 759 (quoting Jones v. United States, 357 U.S. 493, 499 (1958)); Katz v. United States, 389 U.S. 347, 357 (1967).

10/ E.g., United States v. Jeffers, 342 U.S. 48, 51 (1951).

The Court has held that the warrant requirement applies not only to places but also to any personal effects in which people maintain reasonable expectations of privacy, such as mail, luggage, and other possessions. In Chadwick, the Court explicitly held that the privacy interests in such personal effects do not diminish or disappear when they are temporarily located in a public place, rather than in a home or office.[11/] The Court rejected the argument that the Warrant Clause does not apply to "movable personalty lawfully seized in a public place."[12/]

In Sanders, the Court squarely rejected the argument that privacy interests in a piece of luggage disappeared because it was placed in an automobile

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11/ United States v. Chadwick, supra, 433 U.S. at 7.

12/ Id. at 6-7.

trunk. The Court observed that "the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them."[13] It also noted that because "luggage is a common repository for one's personal effects . . . [it] is inevitably associated with the expectation of privacy."[14] Robbins merely reaffirmed this holding when it recognized that many containers other than luggage are also used as common repositories for effects a person may reasonably wish to keep private.[15] The Robbins holding, that a parcel wrapped in opaque plastic embodies a reasonable expectation of privacy for

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13/ 442 U.S. at 764 ("a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations.").

14/ 442 U.S. at 762 (emphasis added).

15/ 101 S. Ct. at 2845-46.

Fourth Amendment purposes, thus merely represents an application of the general rule of Sanders to any container located in a motor vehicle trunk.

The government has not pointed to anything in prior Fourth Amendment jurisprudence which suggests -- contrary to Chadwick, Sanders and Robbins -- that privacy interests in containers are surrendered when they are located temporarily in a locked automobile trunk. Its proposed rule would produce the anomalous result that a container, as to which Warrant Clause protections admittedly attach at both ends of its journey, somehow loses that protection while the owner transports it in a locked vehicle trunk.[16/]

16/ To the contrary, it is settled that the Fourth Amendment applies to persons in motor vehicles. E.g., Delaware v. Prouse, 440 U.S. 648 (1979):

> "An individual operating or traveling in an automobile does

[Footnote continued next page]

The principle that containers do not forfeit their Fourth Amendment protections simply because of the place in which they fortuitously become subject to official scrutiny extends at least as far back as Ex Parte Jackson, 96 U.S. 727 (1878). There, in one of the earliest Fourth Amendment cases, the Court held that the Warrant Clause prohibited the warrantless search of

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> not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel."

Id. at 662 (footnote omitted).

printed matter traveling through the United States mail, and thus in the physical possession of government employees.[17/] If a parcel suitable for mailing is protected while being hand-carried to the post office and while handled by postal workers, those privacy interests certainly cannot evaporate if it is placed in the locked trunk of a car. But that is the rule the government would have the Court adopt.

As Chadwick, Sanders and Robbins correctly decided, expectations of privacy in movable personalty cannot be found to vary with its location. The owner of a briefcase hardly considers that its contents are less or more private as he carries it from home to office. If he considers the subject at all, he would

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17/ 96 U.S. at 733. Jackson has been reaffirmed recently in United States v. Van Leeuwen, 397 U.S. 249 (1970).

certainly feel the contents are more secure against unwarranted intrusion when they are in the locked trunk of a motor vehicle than when the case is left briefly in an unattended conference room.

The strong privacy interests attached to containers placed in motor vehicle trunks are demonstrated most compellingly by considering the effects routinely carried there. At some point virtually every person will use an automobile to transport the most precious and intimate possessions. What attorney has not transported confidential client documents in a document carrier placed in the luggage compartment of a motor vehicle? What person has not transported personal property across town or across the country in a motor car or moving van? Yet, the government's proposal would make every one of these items subject to a warrantless

search solely upon probable cause to stop and seize the vehicle. The limited privacy interest in automobiles under the Fourth Amendment does not detract from the independent privacy interest enjoyed by the container. If anything, a container placed in a locked trunk should be entitled to an augmented degree of constitutional protection.

The government's argument is fatally flawed by its refusal to accept the Court's decisions in Chadwick and its progeny that reasonable privacy interests attach to personal containers, wherever found. The periodic reiteration of the alleged insubstantiality of privacy interests in paper bags in its Brief should not obscure the breadth of the intrusion into personal liberties its proposed "automobile trunk" exception would condone.

2. The Automobile Exception to the Warrant Clause Does Not Legitimate Warrantless Searches of Containers in Locked Trunks.

The government rests its argument that clear privacy interests should be overridden solely upon the so-called automobile exception to the Warrant Clause. But it is certain that the two justifications for that exception do not apply to containers located in the trunk of an automobile seized for probable cause. Neither the inherent mobility of the vehicle nor its pervasive governmental regulation bears at all upon such containers at that point, as Chadwick, Sanders and Robbins recognized.

This Court has rejected the view that motor vehicles and their contents are exempt from Fourth Amendment principles.[18/]

18/ Delaware v. Prouse, supra, U.S. at 662-63 (1979) ("Were the individual subject

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They may be stopped only upon probable cause, and the Court has carefully circumscribed the scope of searches permitted once a vehicle has been stopped and is in police custody.[19/] The police may seize objects within plain view.[20/] And, if a custodial arrest of an occupant is made, the police may search the passenger compartment as an incident to the arrest.[21/] Once the vehicle and its

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to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.").

19/ See, e.g., id.; Coolidge v. New Hampshire, 403 U.S. 443 (1971).

20/ E.g., Colorado v. Bannister, 449 U.S. 1 (1980) (per curiam).

21/ New York v. Belton, 101 S. Ct. 2860, 2864 (1981). The Court of Appeals held that this search cannot be justified as incident to a lawful arrest. United States v. Ross, supra, 655 F.2d at 1169, and we do not understand the government to argue otherwise. Before the police seized the suppressed evidence, the officers had reduced the property to their exclusive

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contents are securely in police custody and the risk of loss of evidence and of danger to the arresting officer have abated, further warrantless searches are proscribed.[22/]

Accordingly, the Court in Sanders expressly rejected the argument that the automobile exception could justify the warrantless search of a suitcase solely because it was taken from an automobile

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control, and there was no danger that the respondent could gain access to the container to seize a weapon or destroy evidence. See United States v. Chadwick, supra, 433 U.S. at 9; Chimel v. California, 395 U.S. 752 (1969).

22/ E.g., Arkansas v. Sanders, supra, 442 U.S. at 763-64; United States v. Chadwick, supra, 433 U.S. at 15 (". . . a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority."); Preston v. United States, 376 U.S. 364, 376 (1964).

lawfully stopped and searched on a public street. 442 U.S. at 762. The Court rejected the contention that the exigency that justified detaining and seizing the vehicle and its contents without a warrant also authorized the subsequent, warrantless search of the suitcase. The Court held that "the exigency of mobility [of the seized object] must be assessed at the point immediately before the search." Id. at 763. The Court found there was no such exigency "after the police have seized the object to be searched and have it securely within their control." Id. Absent independent exigent circumstances at that point, such as danger to the police or risk of loss of evidence, the Court held a warrant had to be obtained, because the narrow circumstances justifying the warrantless seizure of the vehicle expired with its disablement. Id. at 766.[23/]

23/ These principles were applied in a straightforward manner in Robbins. Only

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Although advocating a new automobile trunk exception, the government claims to have no "quarrel" with this Court's decisions in Chadwick and Sanders.[24/] It attempts to distinguish those cases by claiming that they pertain only where law enforcement officers have specific probable cause focusing on a specific container before it is placed in the trunk.[25/] But, all of these cases are "container" cases, not "automobile" cases as the government argues.[26/] Nothing in their reasoning

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three members of the Court supported the view urged here by the government. 101 S. Ct. at 2851-59 (dissenting opinions of Blackmun, J., Rehnquist, J., Stevens, J.).

24/ See Gov't Brief at 9, 15.

25/ Cf. Robbins v. California, supra, 101 S. Ct. at 2850 (Powell, J. concurring).

26/ See id.; see Arkansas v. Sanders, supra, 442 U.S. at 766 (Burger, C.J. concurring).

supports a distinction based upon the point at which the container was viewed by the police. Neither the expectation of privacy vested in the container nor the exigency of mobility would vary with that change in circumstance.

The government cannot have its proposed new global "automobile trunk" exception to the Warrant Clause unless Sanders, Robbins and (by implication) Chadwick are overruled. As demonstrated below, the government has not discharged its heavy burden of proving the need for a new category of warrantless searches. And the fundamental principle of stare decisis counsels against overturning these three recent, considered decisions.[27/]

27/ "The doctrine of stare decisis imposes a severe burden on the litigant who asks us to disavow one of our precedents. For that doctrine not only plays an important role in orderly adjudication; it also serves the

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B. The Government Has Offered No Valid Justification For Creating a Broad "Automobile Trunk" Exception to the Warrant Clause.

The government has advanced several arguments to "meet its 'burden . . . to show the existence of such an exceptional situation' as to justify creating a new exception to the warrant requirement." Mincey v. Arizona, 437 U.S. at 390-91, quoting Vail v. Louisiana, 399 U.S. 30, 34 (1970); see G.M. Leasing Corp. v. United States, 429 U.S. 338, 358-59 (1977).

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> broader societal interests in evenhanded, consistent,and predictable application of legal rules."

Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 (1980) (footnote omitted). Departure from this principle normally is justified only where changes in the historic environment or experience with the rule erodes its validity. See Mitchell v. W.T. Grant Co., 416 U.S. 600, 634-35 (1974) (Stewart, J. dissenting). Neither reason is applicable here.

First, the government contends that, in the circumstances surrounding the search of the trunk of a car seized upon probable cause, the warrant requirement is simply a "procedural" formality, and that the availability of post hoc judicial review of the officer's judgment as to probable cause provides an adequate substitute for prior judicial scrutiny. Gov't Brief at 43. On this point, the government is simply wrong. The purpose of prior judicial scrutiny, and the issuance of a valid warrant, is to establish the particularity of the search to be conducted. The government's proposed rule presumes that particularity need never be established when the search of an automobile trunk is at stake. There is no more justification to permit wholly unparticularized and general searches of automobile trunks than of any other area. And, the Court concluded in Chadwick that prior consideration by a neutral magistrate

is an indispensable predicate to a constitutionally valid container search, because vital Fourth Amendment interests are offended by warrantless searches. 433 U.S. at 9.

Second, the government argues that the suspect's arrest constitutes such a substantial invasion of his privacy that the minimal additional intrusion resulting from the warrantless search of a container found in the trunk is constitutionally insignificant. The Court previously has rejected this claim in, inter alia, Mincey v. Arizona and Chimel v. California, 395 U.S. at 766-67 n.12.

Third, the government suggests that, at least for the innocent, a prompt warrantless search of possessions on the street may constitute a lesser intrusion on privacy than "a custodial arrest while a warrant is sought."[28/] Gov't Brief at

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28/ This point may be of little significance in practice. If the officer

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25-26. As Chief Justice Burger noted in rejecting this argument in Sanders, an individual faced with this choice may elect to avoid detention by consenting to an immediate warrantless search of parcels in the trunk. 442 U.S. at 767 (concurring opinion). But "[innocent] persons might well prefer not to have the contents of their luggage exposed in a public place. They may stand on their right to privacy and require a search warrant." Id. The Fourth Amendment requires that the individual have the right to make this decision for himself.29/

[Footnote continued from preceding page]

has probable cause to seize a vehicle suspected of containing contraband, prudent law enforcement dictates, in most instances, the detention of its occupants pending further investigation. Thus, in general, no additional restraint on liberty will be imposed while a warrant is obtained. This is clearly true here where the respondent already had been arrested and the car seized.

29/ The government argues that police officers may "prudently" decline to conduct

[Footnote continued next page]

Fourth, the government argues that creation of a new "automobile trunk" exception to the Warrant Clause will serve the administrative convenience of law enforcement officials. Gov't Brief at 43-44. The Court repeatedly and categorically has rejected the government's position that streamlining law enforcement is a sufficient justification for infringing the liberties of the public. As the Court stated in Mincey v. Arizona:

> "The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law."

[Footnote continued from preceding page]

a search on the basis of consent for fear it may later be contested. Gov't Brief at 27. The government provides no factual basis for this bald assertion.

437 U.S. at 393 (footnote omitted). The Fourth Amendment was intended to limit the government's ability to make warrantless searches. Unless the government can point to some independent constitutional justification for carving out an exception to the Warrant Clause -- a burden the government has not discharged here -- arguments as to law enforcement efficiency alone cannot prevail over recognized privacy rights, lest those concerns erode the Fourth Amendment.

We also disagree with the government's empirical assertion that requiring the police to obtain warrants before searching containers found in car trunks will impose an intolerable administrative burden. As a practical matter, the pertinent question is whether the police should be required to take the additional administrative step of obtaining a search warrant from a

magistrate, while they are engaged in the other administrative tasks necessary to charge and process the suspect, log in the seized vehicle, and account for any material seized from the passenger compartment and its occupants. See, e.g., South Dakota v. Opperman, 428 U.S. 364 (1976). The government does not contend that the minimal delay necessary to obtain recourse to a magistrate will adversely affect its ability to obtain warrants. We submit that recognition of Fourth Amendment principles in these circumstances will impose no material new obligation on the police, especially in light of management techniques, such as staff support and the availability of warrants by telephone,[30/] that may be introduced to simplify the administrative process.

30/ Fed. R. Crim. Proc., Rule 41(c)(2).

Finally, the government suggests that, in addition to streamlining law enforcement, a rule permitting warrantless searches of all containers found in car trunks would greatly simplify judicial disposition of automobile search cases. Gov't Brief at 41-47. We appreciate the evident frustration of this Court and the lower courts in attempting to formulate workable rules to resolve the difficult Fourth Amendment issues presented in automobile search cases. For all its simplicity, however, the government's proposed bright-line test would strip the public of important privacy rights it has enjoyed since the founding of the nation. The rule that a closed container in a locked trunk may not be searched without a warrant is equally unambiguous. If the rule is made clear and followed, both law enforcement and constitutional interests will be furthered, and the burden of

litigation in this Court and others will be reduced. Any rule that creates a new Warrant Clause exemption is an invitation to further judicial debate.[31/]

II. THE FOURTH AMENDMENT'S WARRANT REQUIREMENT APPLIES TO ALL CONTAINERS, WHEREVER FOUND AND HOWEVER "WORTHY" OR "UNWORTHY," UNLESS THEIR CONTENTS ARE IN PLAIN VIEW.

The government asks this Court to overrule Robbins and to limit the applicability of Chadwick and Sanders to luggage and other containers deemed to be "of a kind conventionally regarded as embodying substantial privacy interests." Gov't Brief at 14. The government's proposed "unworthy" container exception to the Warrant Clause would extend to any such containers whether found in an automobile,

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31/ Cf. Robbins v. California, supra, 101 S. Ct. at 2850 (Powell, J. concurring).

an office, a public place or the hands of its owner.[32/] The government thus suggests a radical departure from settled Fourth Amendment principles.

We urge this Court to reaffirm Robbins and to reject this proposed new Warrant Clause exception. As we emphasize below, the "unworthy" container rule finds no support in either the language of the Fourth Amendment or any interpretation of that Amendment made by this Court, and the government has identified no compelling interests that support the creation of such a new Warrant Clause exception. Nor is the rule justified as a factual matter: the government has failed to adduce anything but its own assumptions to support its assertion that no reasonable expectation of privacy attaches to paper bags and other

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32/ See United States v. Ross, 655 F.2d at 1170.

"insubstantial" containers. Indeed, everyday experience refutes the government's claim.

Moreover, the "unworthy" container rule will not provide any clear guidelines for law enforcement officers or reviewing courts. The factors considered relevant by the government are so amorphous and open-ended that such a rule would raise far more nettlesome factual questions than it would resolve. We respectfully submit that Robbins and prior Fourth Amendment cases point the way to a bright-line test that pays due regard to constitutional liberties, is enforceable, would not adversely affect any law enforcement interest, and would provide readily understandable standards for the protection of individual liberties and the enforcement of law.

A. The "Unworthy" Container Rule Finds No Support in the History of the Fourth Amendment or the Decisions of This Court.

Chadwick and Sanders established that even if a warrant was not required to search an automobile, the owner of luggage lawfully seized has an independent, constitutionally protected expectation of privacy in the luggage and that a warrantless search of the luggage was therefore unlawful. Robbins held that the holdings of Chadwick and Sanders applied as well to plastic-wrapped parcels found in the trunk of an automobile. The plurality opinion in Robbins did no more than reaffirm the long-established principle that, absent exigent circumstances, a warrant is required to search "people and their effects, . . . whether they are 'personal' or 'impersonal.'" See Robbins, 101 S. Ct. at 2846. The plurality also considered the relationship between the

"container" rule and settled "plain view" doctrine and concluded that all closed containers whose contents are not readily discernible by observation enjoy a constitutional protection against warrantless searches. We submit that this aspect of Robbins, which applies to containers wherever they may be found, is clearly in accordance with the language of the Fourth Amendment and the decisions of this Court.

As we have already shown, the principle that the Fourth Amendment extends to all of a person's property -- irrespective of how "private" the property is -- has long been established. For example, in Boyd v. United States, 116 U.S. 616, 630 (1886), the Supreme Court interpreted the Fourth Amendment as outlawing, "not the breaking of his doors and the rummaging of his drawers" but "the

invasion of his indefeasible right to personal security, personal liberty and private property."[33/] See Ex Parte Jackson, 96 U.S. at 733 (1878); United States v. Van Leeuwen, 397 U.S. at 251-52 (1970). Accordingly, although Chadwick and Sanders involved sturdy luggage, they were based upon these precedents that recognized, for example, that parcels wrapped in paper deserved protection against warrantless governmental intrusion. E.g., Ex Parte Jackson, 96 U.S. at 733.

Despite these unambiguous holdings, the government maintains that a footnote to

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33/ Similarly, the Court has held that the Amendment's protections against seizures of "papers" and "effects" are coextensive. "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant." Gouled v. United States, 255 U.S. 298, 309 (1921).

this Court's opinion in Sanders supports what the Court of Appeals below termed an "unworthy" container rule.[34/] The footnote

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34/ The footnote provides:

> "Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. . . . There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile."

442 U.S. at 764-65 n.13 (citation omitted). Of course, the footnote decisively repudiates the government's claim, addressed in Part I of this Brief, that the

[Footnote continued next page]

fails to provide any support for the government's position. Sanders held to the contrary: That warrantless searches are subject only to the same "'jealously and carefully drawn' exceptions to the warrant requirement" that apply to any other property.35/ The footnote does no more than declare that in some instances the contents of a container, for all practical purposes, may be in plain view, either because the contents are actually visible or because they can be readily inferred from outward appearances. It recognizes that, when the container serves no concealing function, its contents are not private, and the Warrant Clause does not

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[Footnote continued from preceding page]

mere placement of a container in an automobile lowers its level of constitutional protection.

35/ Id. at 759-60 (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).

apply. Thus, the Sanders court merely reconciled the holding in Chadwick with settled plain view principles.[36/] Sanders does not provide justification for a new exception to the Warrant Clause for "non-traditional" forms of plastic, cloth or paper containers.[37/] No member of this

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36/ Justice Stewart's plurality opinion in Robbins explained that the Sanders footnote carried the "negative implication . . . that, unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment." Robbins v. California, supra, 101 S. Ct. at 2846.

37/ The government looks to Justice Powell's concurrence in Robbins as support for a flat "unworthy container" rule because that opinion would allow warrantless searches only of those containers in which the owner had manifested no reasonable expectation of privacy. Robbins, supra, 101 S. Ct. at 2849-50 & n.3. Under this view, a factual inquiry would be undertaken in each case that would focus on "the size, shape, material and condition of the exterior, the context within which it was discovered, and whether the possessor had taken some significant precaution, such as locking, securely sealing, or binding the container, that indicates a desire to prevent the contents from being displayed upon simple

[Footnote continued next page]

Court in either Sanders or Robbins indicated any desire to embrace the government's view that containers should be categorized as either worthy or unworthy of constitutional protection.38/

[Footnote continued from preceding page]

mischance." Id. n.3. The practical difficulties of this formulation, which necessarily entails an inquiry into the subjective intent of the accused, are discussed below. See Part II.C. infra.

38/ The government reiterates several policy considerations in support of its "unworthy" container rule. In essence, it argues that the warrant is a formality whose observance should yield to the goal of law enforcement efficiency and that, in any event, the warrantless search of someone's paper or plastic bag is a "lesser intrusion" on his liberty than custodial detention. As we have already demonstrated in Part I above, this Court has decisively and repeatedly held that none of these considerations is entitled to any weight. On numerous occasions, this Court has affirmed the substantial importance of the judicial warrant. E.g., United States v. Chadwick, supra, 433 U.S. at 9-10 (1977); Katz v. United States, supra, 389 U.S. at 350-51 (1967); Camara v. Municipal Court, supra, 387 U.S. at 532. Accordingly, the government's efforts in this context to denigrate the importance of the warrant by reference to claimed policy interests should be summarily rejected.

B. The Government Has Not Substantiated Its Contention That No Person Has a Reasonable Expectation of Privacy in the Contents of an "Unworthy" Container.

Although the absence of any precedential support for an "unworthy" container rule ought to settle the matter, the government's argument suffers from an even more fundamental defect. It concedes, as it must, that luggage and other usual "repositories for personal effects" are entitled to the substantive protections of the Warrant Clause.[39/] The government contends, however, that there are certain

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39/ We note that the government thus accepts the red leather pouch as a "worthy" container fully deserving of constitutional protection, and that it "does not quarrel," Gov't Brief at 9, with the holdings of this Court that vest "traditional" luggage with such protection, even though it is very clear that the government cannot have its extension of the automobile exception unless the Court overrules the very cases with which the government does not "quarrel." We urge the Court not to embrace such befuddlement.

other containers -- i.e., bags, parcels, and boxes of paper, plastic and other flimsy or "insubstantial" materials -- that are so inherently lacking in "substantial privacy expectations" that they are undeserving of the protections of the Warrant Clause. Gov't Brief at 14, 49. The government advances three arguments: First, that some possessions are "personal" and others "impersonal" and that there is no reasonable expectation of privacy in impersonal material; second, that certain containers are only "atypically" used for transporting personal articles and are therefore not entitled to Warrant Clause protections; and third, that no reasonable person would expect to keep the contents of such containers -- whether personal or impersonal -- screened from public view.

We agree with the government that the Fourth Amendment preserves and protects

from governmental intrusion a person's reasonable expectation of privacy. See Katz v. United States, 389 U.S. at 360-61 (Harlan, J., concurring). We submit, however, that a person has a reasonable expectation that all his "effects, whether they are 'personal' or 'impersonal,'" will remain private and shielded from intrusion unless he knowingly exposes them to the public. Robbins, 101 S. Ct. at 2846; Katz v. United States, 389 U.S. at 351.40/ The Fourth Amendment does not discriminate between a container which commonly houses the most intimate of one's belongings and

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40/ The presence or absence of constitutional protection cannot turn upon any purported dichotomy between "personal" and "impersonal" items. The language of the Fourth Amendment recognizes no distinction between "personal" and "impersonal" effects. Indeed, the colonial experience demonstrates that Americans objected strenuously to seizures of smuggled goods from local merchants -- undoubtedly "impersonal" effects. See United States v. Chadwick, supra, 433 U.S. at 7-8.

one which commonly contains only the most prosaic. Absent exigent circumstances, the government simply has no business examining the contents of either container without a prior determination of probable cause by a neutral and detached magistrate.

Everyday experience disproves the government's claim that no reasonable person would put anything personal or private in a paper bag, or other similarly flimsy container. Even the government is forced to admit that an "unrepresentative" use is a "theoretical possibility." Gov't Brief at 36. But it urges this Court to overlook such an "atypical use" on the ground that if such a use is "not part of the conventional 'understandings that are recognized and permitted by society,'" it is not worthy of constitutional protection. Id. It goes without saying that the idea that "convention" ought to define the scope

of the Fourth Amendment is unprecedented. Many people cannot afford or do not choose to own the sort of "substantial" luggage that the government views as essential to preservation of Fourth Amendment protections. The Warrant Clause protects the vagrant's ragged shopping bag no less than the double-locked footlocker in Chadwick. See United States v. Ross, 655 F.2d at 1170 n.30.

In any event, the government's proposed standard is bereft of any foundation in fact. It has not attempted to provide any authority to support the startling claim that articles that their owners wish to shield from public or official scrutiny are not placed in flimsy containers. People choose a wide variety of containers for a multitude of purposes, and these choices change constantly. Experience demonstrates that, when

traveling on airplanes and trains, many people carry belongings of a highly personal nature in plastic shopping bags, secured at the top with a drawstring and bearing some merchant's insignia, or in the ubiquitous luggage of choice, open-top totebags. Although a few decades ago, travelers may have found matched luggage a necessity, people now transport their possessions in insecure containers of canvas, paper and pliable plastic. Are Fourth Amendment protections to vary according to whether these individual choices are "recognized and permitted by society"?

As for the paper bag or similar container, its very anonymity actually encourages its use for storing or transporting highly private possessions. For example, paper shopping bags are thought by many to be particularly suitable

for disguising bank deposits. Similarly, it is a commonplace that some reading materials, protected by the First Amendment, may come into their owner's possession in a plain brown wrapper. Thus, in any particular case, the police cannot know whether the "unworthy" container is truly "unworthy" until the privacy of its owner has already been invaded by a warrantless search. See United States v. Ross, 655 F.2d at 1170 & n.31.

In fact, the government's claim that no one puts anything private in a paper bag is belied not only by this very case -- in which respondent apparently placed heroin in a brown paper lunchbag -- but also by Robbins and a plethora of lower court decisions involving items seized from such containers as closed and open cardboard boxes, sealed plastic garbage bags and partially open plastic bags. See United

States v. Ross, 655 F.2d at 1166 & n.16; Gov't Brief at 31 n.18. The very controversy now before the Court proves that "unworthy containers" are very often "pressed into service" as repositories for effects that people wish to conceal from public view. See Gov't Brief at 36.

Indeed, all of us have put some of our most treasured secrets and most intimate possessions in "unworthy" containers when we have put them in the mail. Yet, the government concedes, as it must, that a paper envelope entrusted to the United States mails deserves the protection of the Warrant Clause. See United States v. Van Leeuwen, 397 U.S. at 251-52.

Finally, this Court should resist the government's implication that as long as the search of a container "not embodying substantial privacy interests" does not turn up evidence of a crime, the individual

does not have a substantial ground for constitutional complaint. Gov't Brief at 24. An ordinary person has every right to be incensed if his possessions, however innocuous, are searched under color of law in a public place. The innocent victim of a warrantless search is injured -- indeed irreparably injured -- even if all that the search turns up is his "next meal." See id. Such a search not only provokes intimidation and fear of false arrest, but may degrade his reputation in the most basic sense. Cf. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 389-90 (1971). Absent a warrant or some well-established exception to the Warrant Clause, the government is simply not entitled to know what that person has stored in his brown bag, however mundane those contents are.

C. The Government Concedes That the "Unworthy" Container Rule Would Not Advance the Goals of Administrative and Judicial Efficiency.

Even if law enforcement efficiency were a justification for undermining Fourth Amendment protections -- which it is not -- the government has conceded a critical flaw in its own case: That its "unworthy" container rule will initially require "case by case delineation of the types of containers possesing [sic] high enough privacy attributes to justify insistence upon a warrant." Gov't Brief at 40. The government in effect concedes that the "unworthy" container rule is not a rule at all, or at least not a rule that is susceptible to even-handed and expeditious application by law enforcement officials, or by courts required to resolve the welter of pre-trial suppression motions certain to result.

In return for a rule that allows law enforcement officers to rummage freely through bags and parcels of unspecified description, wherever found, the government offers no countervailng administrative or judicial efficiencies. For example, although the government would like this case to decide that respondent's closed but unsealed paper bag is not worthy of the protections of the Warrant Clause, the treatment of a sealed paper bag would be undetermined and ripe for further litigation. Also left for case by case resolution by law enforcement officers -- and for reviewing courts -- would be the constitutional protection to be accorded the totebag, the orange crate and the pillowcase. See Sanders, supra, 442 U.S. at 772 (Blackmun, J., dissenting).

In fact, the government's proposed rule is so vague, open-ended and

unprincipled that one cannot predict with any degree of certainty that a paper bag identical to the one in respondent's trunk will not encounter an entirely different fate in the next case. The government concedes:

> "This case does not present the question whether, by reason of its particular features, its appearance, its surroundings, the conduct of the person claiming Fourth Amendment protection, or other circumstances, an individual may so manifest his expectation of privacy in a container ordinarily employed for low-privacy uses as to render a warrantless search of the particular container unreasonable."

Gov't Brief at 37 n.21 (citations omitted). There can be little doubt of the import of this admission: The government's theory requires inquiry into the accused's subjective intent, as revealed by the totality of the circumstances. Thus, the very same paper bag for which the

government seeks a reversal in this case will come before the federal courts again. On that later occasion, presumably, the inquiry will be whether the owner of that paper bag manifested a reasonable expectation of privacy in its contents. One can imagine how the owner will testify, if asked at a suppression hearing.

The government argues, however, that the Court need not concern itself here with this "theoretical possibility" because:

> "Absent such [objective factors], however, an owner's subjective expectation of privacy (and there is no showing here that respondent had any such subjective expectation) should be insufficient to trigger the warrant requirement."

Id. (emphasis added). We find this assertion astonishing. First, for the reasons set forth above, it is clear that objective criteria, such as the characteristics of the flimsy container,

cannot reveal the privacy interests of the owner. Second, respondent was not afforded an opportunity to prove that he had a subjective expectation of privacy in the contents of the bag. Furthermore, we are unaware of any facts in the record that would lend any degree of plausibility to the government's contention that respondent did not manifest a reasonable expectation of privacy -- whether subjective or objective -- in the contents of the bag. To the contrary, the facts of record show that the bag was closed and secreted in the locked luggage compartment of respondent's car.

Far from establishing a bright-line test to advance administrative and judicial efficiency, the government's "unworthy" container rule promises only to perpetuate "incessant litigation" of automobile search cases. See Robbins, 101 S. Ct. at 2850

(Powell, J., concurring). We urge the Court to resist the government's plea for a reversal in this particular case, on a theory it concedes will only bring this very issue before the courts again.

CONCLUSION

We advocate a bright-line test which is completely consistent with the Fourth Amendment, as construed by this Court; easily comprehensible and enforceable by law enforcement officials; and designed for ease in judicial administration: If a container found in an automobile trunk conceals its contents, then that container is protected by the Fourth Amendment, and the police must obtain a search warrant before they may search it. This rule is supported by the language and prior interpretations of the Fourth Amendment, is feasible of administration, and will substantially reduce judicial enforcement

difficulties by directing all remaining questions to familiar and settled notions of probable cause and the plain view doctrine.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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